Petitioner's Brief: David E. and Nick P-M., Richard Montgomery High School

ZIVOTOFSKY V. SECRETARY OF STATE

Brief for the Petitioner

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Statement of Argument

The President's recognition power is indeed subject to Congressional control, as there is no basis to conclude that the President's power is plenary. Respondents overstate the power of the executive to unilaterally make decisions regarding foreign policy and understate Congress's prerogative to participate in those matters. James Madison, the father of the Constitution, supports this position, having stated, "The words of the constitution are, 'He shall receive ambassadors, other public ministers, and consuls.'...little, if any thing, more was intended by the clause, than to provide for a particular mode of communication...*it would be highly improper to magnify the function into an important prerogative"* (emphasis added). And, as Justice Jackson made clear in his concurrence in the 1952 case *Youngstown v. Sawyer*, "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." The Department of State's policy is to refuse to accommodate a passport applicant's request to designate their place of birth as Jerusalem,

Israel. Because the Foreign Relations Authorization Act, passed by Congress, requires the Respondent to accommodate that request, the Department's policy is clearly "incompatible with the expressed...will of Congress". The Constitution does not grant the President exclusive power to enact this policy, and because such an area of policy would not be precluded by Article II or the 10th Amendment, the default assumption is that such a matter is within the purview of Congress. Therefore, Congress must prevail and we ask this Court to find the statute constitutional.

Argument

I. Congress has the Power to Set Parameters for the Execution of a Delegation of Authority

It is Congress, not the President, which possesses the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." And so Congress in 2002, acting under this constitutional grant of power, passed the Foreign Relations Authorization Act, Fiscal Year 2003 (Public Law 107-228) ("the Act"). Section 214(d) of the Act provides that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." However, the Department of State directs its consular officers to "for a person born in Jerusalem, write JERUSALEM as the place of birth in the passport. *Do not write Israel, Jordan or West Bank for a person born within the current municipal borders of Jerusalem*" (emphasis added). The Department's policy plainly makes no exception, as the Act demands, for persons who request to have their birthplace listed as Israel. This makes the Executive's policy "incompatible with the expressed...will of Congress" (Youngstown).

The Secretary of State's authority to issue passports is derived from 22 U.S.C. §211a. More fundamentally, the basis of Congress's power to enact 22 U.S.C. §211a is the Necessary and Proper Clause, which empowers Congress "To make all Laws...for carrying into Execution...all other Powers vested by this Constitution in the Government of the United States, *or in any Department or Officer thereof*" (emphasis added). A necessary corollary of Congress's ability to empower the Secretary, head of a "Department...of the Government of the United States", to issue passports is the ability of Congress to set the parameters for the implementation of the Secretary's authority. Setting parameters for the implementation of a Congressional grant of authority is precisely what Congress has done in this case.

II. The Structure of the Constitution Suggests a Shared Authority over Foreign Affairs

The structure of the Constitution also implicates a nonexclusive recognition power. The Constitution gives Congress, in all other matters concerning foreign affairs, power

coincident with or greater than that of the Executive. *Congress* is authorized "to regulate commerce with foreign nations", "establish a uniform rule of naturalization", and "declare war". While a President may wage war, it is left to Congress to declare war and to fund the military. The President may "make treaties", but only "by and with the advice and consent of the *Senate*" (emphasis added). He is further reliant on Congress as a whole to implement legislation effectuating a treaty. The Executive's contention that the power of recognition is his alone is therefore inconsistent with the Constitution's scheme of separation of powers and branch interdependency. The Court vindicated the coexistence of power over foreign relations as recently as 2008, stating "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Medellín v. Texas, 552 U.S. 491.* If the Court were to follow the Executive's argument, it would necessarily follow that Congress could not declare war on, regulate commerce with, or regulate immigration from a state or region which the Executive spontaneously decides does not exist. The Framers could not have intended for the legislature to not be so easily handicapped.

Furthermore, the structure of Article II, Section 3, which contains the clause giving the President the duty of receiving ambassadors, suggests that the power to receive ambassadors was not intended to be an important executive prerogative. Section 3 primarily consists of the President's duties with respect to assisting Congress, including delivering information about the state of the union, convening Congress, and setting an adjournment date for Congress. The natural conclusion to be drawn from the placement of the Reception Clause within Section 3 is that the President's ability to receive ambassadors was primarily a matter of convenience.

The delegates who ratified the Constitution had the same impression. Says North Carolina delegate Archibald Maclaine, "during the recess, the President must do this business [of receiving ambassadors], or else it will be neglected; and such neglect may occasion public inconveniences." Maclaine notes that the duty to receive a foreign ambassador belongs to the President because his perpetuity makes him a more convenient interface with other nations. This contrasts with the scheme of reception under the Articles of Confederation that gave the Congress the "sole and exclusive right and power...of sending and receiving ambassadors." But the contrast between the Constitutional scheme and the Articles of Confederation scheme is only evidence that the framers and delegates sought to make the process of receiving ambassadors more efficient – not that they sought to completely upend congressional authority.

III. Historical Precedent Contradicts the Executive's Claim of Exclusive Authority

Respondent Kerry's position is undermined by the fact that the Department of State has, in the past, conformed to the will of Congress in a very similar situation. In 1994, the

sovereign. The Department of State thereafter adopted a policy requiring consular officers to write "China", not "Taiwan" as a passport applicant's place of birth. However, Congress passed and the President signed into law the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Public Law 103-236), section 187 of which provides that, "for purposes of the registration of birth or certification of nationality of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan." The State Department then amended their regulations to conform to the duly enacted law. Therefore, the Department's current policy marks a sharp departure from the Executive's own past precedent.

Respondent considers past examples of congressional acquiescence to executive recognition claims to be historical precedent supporting his claim of a sole recognition power. However, congressional inaction is irrelevant. Past examples of congressional inaction, like when President Monroe refused to recognize certain insurgent Latin American republics, are evidence only of concurrence in result, not of acceptance of the Executive's rationale. That Congress did not pass a resolution or bill challenging the Executive's recognition is only evidence that Congress agreed with the policy objective of recognizing a certain state. It is not evidence of agreement with the President's assertion that he alone may recognize a state. As Alan Morrison, Professor of Law at the George Washington University School of Law, explains, this Court held in *INS v. Chadha,* 462 U.S. 919 that action by only one house of Congress did not carry legal weight. It follows that action by *neither* house of Congress carries is also legally insignificant. *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 Geo. Wash. L. Rev. 1211 (2013).

IV. The Court should not Attempt to Parse Political Arguments

The Respondent also contends that Congressional authority in this area would compromise the effectiveness of the nation's diplomatic and military affairs. However, that argument is a non-justiciable political question that this court is not competent to consider. Addressing the political question argument, this court in 2011 allowed the district court to consider this controversy only because "this case asks the courts to determine only whether Zivotofsky can vindicate his statutory right under §214(d) to choose to have Israel recorded as his place of birth on his passport" (Zivotofsky v. Clinton). The Court further noted that "making such determinations is a familiar judicial exercise." However, weighing the advantages and drawbacks of certain policy questions, rather than the sources of authority, is a matter to be left to the political branches of government – not the courts.

Conclusion

The structure of the Constitution, precedent set by this court, and historical precedent all suggest that the President shares his recognition power with Congress and that Congress has the authority to direct the Secretary of State to comply with the wishes of a passport

applicant and write "Israel" as the applicant's place of birth. The authority to issue a passport is given to the Secretary of State by the Congress, and Congress therefore has the authority to set the conditions and parameters under which that authority may be exercised. The *Youngstown* precedent is controlling because the Court is presented with a case where the President's executive action clearly "incompatible with the expressed...will of Congress." The Executive can triumph only if he can demonstrate a constitutional authority to disobey Congress. He cannot. The Constitution's words state only that he shall "receive ambassadors". As both the delegates who ratified the Constitution and James Madison, the father of our Constitution, understood it, this duty is purely a matter of convenience, arranged in contrast to the Articles of Confederation scheme because Congress would not constantly be in session. The structure of the Constitution itself also lends itself to a shared recognition power. Every other foreign affairs power is subject to a form of control by Congress, including the ability to appoint ambassadors and those powers inherent in being commander-in-chief. Congress, because of the fears of a despotic Executive, was intended to always have a role in setting the path of the nation both at home and abroad. But even if this Court chooses to look at historical practice rather than the text and structure of the Constitution, it is evident that the Executive still does not possess a unilateral recognition power. The Taiwan precedent is strikingly similar to the case before the Court today. In 1995, the Department of State, even though it contradicted the executive's One-China policy, followed Congress's instructions in the Foreign Relations Authorization Act to write "Taiwan" instead of "China" on relevant passports.

Respondent Kerry's final strategy is to claim that allowing Congress to permit writing "Israel" on a passport might compromise the effectiveness of U.S. diplomacy. But to even consider this argument, the Court would have to first conclude that a sole recognition power exists. For if this Court concluded that the recognition power is shared, the Respondent's argument would be a political question that should be resolved by the political branches of government. Just as a President could not use the fear of a fiscal downturn to justify defiance of Congress's legitimate exercise of the interstate commerce power, so too can the President not use the fear of adverse foreign policy consequences to justify defiance of Congress's legitimate exercise of the shared recognition power.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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